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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-194325 DATE: October 22, 1979

MATTER OF: Kentucky Building Maintenance, Inc. (N601906

[Protest Contending IFB Was Materially Deficient]

DIGEST:

1. Protester essentially contends that IFB is ambiguous because it requires all subcontractor effort to be included in "productive man-hour" rate but apparently excludes hours of subcontractor personnel from computation of total contractor hours used on contract. Contracting agency contends that IFB provides that payment is based on productive man-hours actually furnished which includes both contractor and subcontractor hours. Since ambiguity in legal sense exists only where two or more reasonable interpretations are possible, IFB is not ambiguous because only reasonable interpretation is that subcontractor hours, if any, are not excluded from total productive man-hours furnished.

2. Protester argues that award fee and incentive provisions of an experimental IFB are inconsistent. Contracting agency disagrees and explains how contractor may be entitled to both. GAO has no basis to object to these provisions because each provision has unique objective and these objectives are not incompatible.

3. Protester contends that IFB's Emergency Conditions provision--requiring contractor to make snow and ice removal and handling of similar conditions top priority and requiring contractor, under emergency conditions, to act on directives from Technical Manager--creates unfair hardship in bid calculation since Government could increase contractor's work without added

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compensation. Difficulty in computing bid price is not basis for agency to revise its requirements where (1) the need is undisputed, (2) the provision merely requires contractor to make remedy of emergency condition top priority, and (3) in unusual circumstances, when extra work was directed, agency would make or be required to make equitable cost adjustment.

4. Protester contends that IFB provision--requiring bids to be based on nine paid holidays plus "all future holidays declared as legal by the United States Congress or by Executive Proclamation"--provides no realistic way for bidder to estimate its costs. Realistically, in GAO's view, worst-case actual impact on bidder's price would be de minimis. Since all bidders are required to assume same risk, GAO will not permit presence of this provision to disrupt ongoing procurement.

5. Contention--that IFB requirement that bidders submit completed GSA Form 527, "Contractor's Qualification and Financial Information," with bid would force bidders to reveal privileged and confidential information--is without merit because it is clear that such information was requested to assist in responsibility determination and not for bid evaluation. Therefore, bidder could have submitted form and identified it as proprietary, thus prohibiting its disclosure and not interfering with other bidders' opportunity to determine whether all were bidding on common basis.

6. Protester contends that IFB is ambiguous since agency issued new page 26 with no noted changes, thus raising possibility of inadvertent omission. Where instructions in IFB explained how changes were to be identified and none were noted on page 26, only reasonable interpretation is that there were no changes on that page especially

where, as here, pages were printed on both sides and changes on other side of page 26 necessitated reissuing both sides of page.

7. Incumbent contractor, who was operating under same "Waste Material Collection and Removal" provision on four other agency contracts, contends that provision is ambiguous because it does not provide for removal of garbage after its collection. Agency in essence reports that there is no garbage, this was explained at bidders conference, and summary of that explanation was issued as part of amendment 1 to IFB. GAO concludes that IFB, as amended, served to effectively communicate agency's interpretation of this provision to incumbent contractor, so that it was not misled or prejudiced.

This decision involves an experimental contract resulting from a solicitation issued pursuant to an approved deviation from the Federal Procurement Regulations. The General Services Administration (GSA) issued invitation for bids (IFB) No. GS-03C-90339 requesting bids for the furnishing of janitorial services in the GSA Regional Office Building and Southwest Bus Terminal in Washington, D.C. This IFB concept (formally advertised fixed-price contract with award fee and incentive provisions) is reportedly critical to the GSA janitorial services program. Several large and complex buildings in the Washington metropolitan area are now being serviced under a cost-reimbursement-type contract with an incentive award fee provision (ITC contracts), which will expire within the next 12 months. GSA believes that this IFB concept is a viable alternative to ITC contracts for janitorial services and incorporates concepts and ideas (adaptable to janitorial services) taken from an attendant services contract used by the Naval Regional Procurement Office, Long Beach, California, unsuccessfully protested in Palmetto Enterprises, 57 Comp. Gen. 271 (1978), 78-1 CPD 116.

Kentucky Building Maintenance, Inc. (Kentucky), protests contending that the IFB is materially deficient and requires substantial revision. Specifically, Kentucky contends that: (1) the term "productive labor man-hour" is ambiguous; (2) the award fee and incentive provisions are inconsistent; (3) the Emergency Conditions provision is potentially open ended; (4) the "paid holidays" provision gives the Government the unilateral right to increase the contractor's cost; (5) the IFB requires public display of confidential financial information; and (6) there are other IFB ambiguities.

I. Productive Labor Man-Hours

The key factor in the award determination and the amount the contractor will be paid is the "productive labor man-hour" rate.

The IFB provides that:

> "Bids must consist of a dollar figure per hour based on productive labor man-hours provided by the contractor. The productive man-hour ceiling stated in the contract covers all job functions required. The bid price per hour must be sufficient to provide money to cover wages, fringe benefits, uniform allowance (if applicable), taxes, supplies, materials, equipment, supervision, clerical costs, subcontract cost, overhead, and any profit proposed above that which the contractor expects to receive through the Award Amount procedure given in the contract. In addition, overtime cost must be included in the bid price. The bid price per hour will not be increased for any overtime hours expended."

Kentucky states that "productive man-hour" includes only hours actually worked by janitorial-type employees and excludes supervisory or clerical/administrative man-hours and vacation, sick leave, etc. Kentucky also states that the IFB creates an "absurd situation" by apparently requiring that all subcontractor effort

must be included in the price of a "productive man-hour" even though the subcontractor's employees are performing "productive" work since the contractor will be paid on the basis of total productive man-hours of contractor personnel only (not subcontract persons). However, Kentucky recognizes that it is entirely possible that GSA may intend "productive man-hour" to include all productive work performed by contractor or subcontractor personnel but, then, the IFB presents a trap to those bidders who do not recognize the significance of the above-quoted lanaguage.

Kentucky concludes that the exclusion of subcontractor productive hours creates an impossible bidding situation since bids will be evaluated on the basis of lowest productive man-hour price and contractors who intend to perform some of the work through subcontractors will necessarily have higher productive man-hour rates (to cover subcontract costs) than those who do not; accordingly, bidders intending to use subcontractors will be unfairly prejudiced.

In response, GSA initially refers to a more complete context on which Kentucky bases its belief that "subcontract persons" may be excluded from "productive man-hours," as follows:

> "The contractor agrees to furnish each calendar month to the GSA Buildings Manager a certified report of productive man-hours furnished that month on the contract. The report will certify total productive man-hours of contractor personnel only (not subcontract persons). Productive man-hours shall not include any form of supervisory or clerical/administrative man-hours. Productive man-hours actually furnished each month will form the basis of payment at the bid price, subject to the productive man-hour quarterly ceiling specified, and to documentation from the sign in/sign out register (GSA Form 139 - Record of Time of Arrival and Departure from Buildings)." (Emphasis added by GSA.)

GSA also refers to other solicitation provisions relevant to the definition of "productive man-hours." The term is defined in "Schedule of Requirements," where it states: "'Productive man-hours' does not include man-hours for vacation, holiday, supervision, or other non-productive labor man-hours." GSA notes that the definition does not exclude productive labor of subcontract employees. Further evidence for the conclusion that productive work of subcontract employees is within "productive man-hours," GSA believes, is the fact that the subcontract employees are required to sign in and out on GSA Form 139, "Record of Time of Arrival and Departure from Building," which is used to determine the basis of payment. Another paragraph in the solicitation indicating that productive work of a subcontract employee is a "productive man-hour," in GSA's view, is paragraph 1 on page 4 of section "B," Specific Instructions (Amendment 1), which provides, in part, that "[t]he productive man-hour ceiling stated in the contract covers all job functions required."

Secondly, GSA argues that it is unreasonable for Kentucky to assume that since the contractor is required to certify only the productive man-hours of contractor personnel, subcontractor effort is not a "productive man-hour." GSA notes that within the same paragraph relied on by Kentucky, it is stated that "Productive man-hours actually furnished will form the basis of payment"; in addition, this paragraph also provides that the "Productive man-hours actually furnished...(is subject) to documentation from...(GSA Form 139...)."

GSA concludes that it is clear that when the contract is read in its entirety, there is no doubt that a "productive man-hour" includes all productive work performed by contractor and subcontractor personnel.

In considering protests alleging ambiguous requirements, we have noted that an ambiguity in a legal sense exists only where two or more reasonable interpretations of the IFB requirements are possible. See, e.g., Chemical Technology, Inc., B-190619, May 9, 1978, 78-1 CPD 349; Palmer and Sicard, Inc., B-192994, June 22, 1979, 79-1 CPD 449. GSA's interpretation is simply that a bidder

will usually arrive at its bid price per hour by determining the total cost to provide the services solicited and divide it by the productive man-hour ceiling stated in the contract (80,557 hours). Clearly, this interpretation flows from the entirety of the solicitation and is reasonable. On the other hand, we must agree with Kentucky that its contention that there is another interpretation--one in which the total cost would be divided by the stated ceiling minus any subcontractor hours--would be an "absurd situation." We do not believe that this constitutes a reasonable interpretation of the solicitation's requirements. Accordingly, this aspect of the protest is denied.

II. Award Fee and Incentive Provisions

Kentucky contends that the IFB is also materially deficient because it contains two inconsistent "incentive" provisions, one of which may actually work to the detriment rather than benefit of the contractor. The IFB provides for an entirely subjective award fee of up to $33,000 per year for high quality service and an "incentive" to the contractor who expends fewer than the IFB-specified estimated productive man-hours, as follows:

> "* * * [I]f the contractor is able to accomplish the work in a satisfactory manner while using fewer hours than the ceiling permits, the Government will pay for only the productive man-hours provided and will share the savings with the contractor. The contractor will receive 35% of the cost savings."

Kentucky argues that it is axiomatic that a reduction in productive man-hours will result in a diminution in quality of performance. Kentucky believes that while performance with reduced hours may well be "satisfactory," it necessarily follows that performance with reduced hours will not be as "excellent" as performance with the maximum hours; hence, this incentive provision will necessarily be working in conflict with the "award fee" provision.

In addition, Kentucky notes that the contractor whose "fixed" costs (i.e., everything but direct wages to employees) exceed 35 percent of his productive man-hour rate will actually lose money with every hour not worked, since he will lose 65 percent of his hourly rate for each hour not worked. Thus, in Kentucky's view, the contractor will have an incentive to maximize rather than minimize the number of hours his "productive" employees are on the job even if there is nothing for them to do. Kentucky concludes that this absurd result cannot be in the Government's interest and should not be condoned.

GSA disagrees with Kentucky's initial premise--that a reduction in productive man-hours will not, of necessity, reduce the quality of performance--since much would depend on the personnel of the contractor as well as the contractor's supervision of such personnel. In addition, GSA notes that the contractor would not be required to seek additional compensation (or cost savings) under either the "award fee" or the "incentive" provision; it may decide to strive for the highest rating under the "award fee" provision, without reducing its productive man-hours. GSA also notes that a contractor may also reduce its productive man-hours under the "incentive" provision, while performing the work in a satisfactory manner as opposed to seeking the highest ratings.

Kentucky's argument--that the incentive provisions are inconsistent--is without merit. Each provision has a unique objective: the award fee seeks to maximize the quality of performance and the incentive fee seeks to reduce costs, and these objectives are not incompatible.

This aspect of Kentucky's protest is denied.

III. Emergency Conditions

Kentucky states that the IFB contains an "Emergency Conditions" provision which may result in workload fluctuations that render rate computations difficult and the quarterly ceilings unfair. The IFB provision, in this regard, states:

> "In case snow and ice removal is required or an emergency condition, requiring immediate attention exists, (such as flooding of a particular section of the building), the contractor shall divert his force, or such part thereof either as scheduled or directed by the Technical Manager as necessary, from their normal assigned duties to meet the condition. When these employees are no longer needed for the special work, they shall be directed by the contractor to return to their normal duties."

Kentucky believes that this provision may require unusual expenditures of productive man-hours and/or overtime during the winter months (snow and ice removal) or at other times without any increase in the contractor's productive man-hour rate or in the quarterly man-hour ceiling. Kentucky contends that this provision creates unfair hardship on bid calculation since it puts in the hands of the Government the ability to increase or alter the nature and magnitude of the contractor's effort without affording the contractor a reasonable means of pricing out or recovering the costs of such effort.

In response, GSA argues that Kentucky's allegation is unfounded since the Government's productive man-hour ceiling represents a reasonably accurate level of effort required by a contractor, including the manpower for snow and ice removal, and relief from an unusual emergency effort during the course of the contract would be handled under the "Changes" clause.

We recognize that possible workload fluctuations may result in difficult rate computations but that does not provide a basis to require an agency to revise the statement of its minimum needs. No one could dispute the contracting agency's need to remove snow and ice or to handle similar conditions expeditiously; the disputed provision merely requires the contractor to make it a top priority; the provision also makes it the contractor's obligation to follow the Technical Manager's directives, if any, in such emergencies.

Naturally, GSA contemplated that under unusual circumstances necessitating such directives, additional compensation to the contractor may equitibly be required. Accordingly, we find no merit in this aspect of Kentucky's protest.

IV. Vacation Days

Kentucky notes that the cost of nine holidays is to be included in the contractor's productive man-hour rate; however, the wage determination also provides:

> "In addition, Inauguration Day and all future holidays declared as legal by the United States Congress or by Executive Proclamation shall be paid holidays."

Kentucky contends that this provision gives the Government the unilateral right to increase the contractor's costs without any hope of recoupment and there is no realistic way that a bidder could factor the possibility of such costs into his bid rate. Accordingly, in Kentucky's view, this provision (without a corresponding equitable adjustment provision) is improper.

In response, GSA states that the risk to be taken by a contractor is minimal and that the presence of some risk does not render the solicitation improper (Palmetto Enterprises, supra). GSA notes that Kentucky could factor such possible costs into its bid price through a contingency amount which must be weighed against the risk (of a holiday being declared) and against the competitive edge gained by taking the risk.

In our view, the disputed provision realistically would have (1) no actual impact on a bidder's bid rate, and (2) even in the event of actual impact, the worst-case practical effect is so small that the other inherent risks in pricing make it de minimis. Since this provision would not prohibit a potential bidder from competing and since all bidders are asked to assume the same risk, our Office will not permit the presence of this provision to disrupt an ongoing procurement.

V. GSA Form 527

The IFB requires each bidder to submit a completed GSA Form 527 as part of its bid. Kentucky states that this form, when completed, contains a great deal of information that most companies consider privileged and confidential. Kentucky contends that since the completed form will be part of the bid, each bidder will be forced to put on public display information which might ordinarily be kept closely guarded and which might be put to unfair uses by competitors.

Again, GSA reports that Kentucky's fears are unfounded because the information requested in GSA Form 527, Contractor's Qualification and Financial Information, is used by the contracting officer to determine the financial qualification of bidders and such privileged and confidential financial information is not available for public release.

It seems clear that financial information requested was relevant to the contracting officer's responsibility determination and not to the responsiveness of the bid. Therefore, a bidder could have submitted the completed form and identified it as proprietary, thus prohibiting disclosure. While GSA needed this information to determine responsibility, other bidders did not need to review it to determine whether they were bidding on a common basis. See B-176421, January 31, 1973, in which the bid was responsive where literature submitted with the bid, although restricted by the bidder, was not required for evaluation of the bid. Accordingly, this aspect of the protest is without merit.

VI. Other IFB Ambiguities

Kentucky states that the IFB contains a number of other ambiguities; for example, amendment No. 1 substituted a "new" page 26 with no changes noted thereon. This raises the question of whether GSA inadvertently omitted something from page 26 that should now be included.

GSA reports that there were no inadvertent omissions and that the amendment clearly identified changes as follows:

> "The pages listed below supersede and replace like pages in the solicitation. Pages with changes in text affecting the offer are identified 'Amendment 1 February 22, 1979.' Text changes are identified with a vertical line in the right hand margin. * * *"

The superseded pages then are identified. Since the pages in the IFB were printed on both sides, replacement pages were likewise printed on both sides to coincide with the IFB as a convenience to bidders in replacing the pages. No change to the text was identified on the "new" page 26. Consequently, there is no ambiguity.

GSA's explanation should have been obvious to Kentucky. Accordingly, this aspect of the protest is without merit.

Finally, Kentucky notes that amendment No. 1 also substituted a new page 52, which provides:

> "Waste Material Collection and Removal: All refuse, debris, rubbish, trash (burnable and unburnable), and garbage generated in or about the building, including snackbars and vending areas, shall be collected and placed in the compactor or the open top debris container, as applicable (except garbage) for removal from the building by others daily, except as otherwise provided. * * *"

In Kentucky's view, the IFB contains no provision for the disposition of "garbage." While Kentucky notes that there is a reference to "recyclable waste" on page 53, which may or may not include "garbage," there is no reference to "nonrecyclable waste," which may or may not include "garbage", thus, the IFB is ambiguous in this regard.

GSA reports that in essence there is no garbage to be collected and disposed of; the question of a contractor's responsibility for cafeteria and vending areas was addressed at the prebid conference and a representative of Kentucky attended the conference. A report summarizing that meeting was attached to amendment No. 1. At the meeting, it was stated that the contractor is responsible for the snack bar but not the cafeteria and its responsibility is limited to floor maintenance. GSA notes that Kentucky has been operating under the same "waste" provision on four other GSA Region 3 contracts with no problem as to ambiguity concerning garbage. In fact, Kentucky is the incumbent contractor in the building which is the subject of the solicitation.

While the provision quoted by Kentucky may be incomplete concerning garbage disposal, we believe that the entire amendment, including the comments from the bidders conference, served to clarify the contractor's "waste" (including garbage) removal and disposal obligations. Moreover, since Kentucky was the incumbent contractor and was familiar with GSA's interpretation of the same "waste" provision on other GSA contracts, we do not conclude that Kentucky was misled or prejudiced by that provision.

Protest denied.

R. F. Keller

Deputy Comptroller General
of the United States